No. 108.

DEC 2 1902
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the
By. & Attorneys & Perry &
& Opp
Filed Dec. 1, 1902.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee,

No. 1

BRIEF FOR APPELLEE.

W. C. PERRY,
Solicitor for Appellee.

JAMES M. BECK,
Assistant Attorney General,
Of Counsel.

The Linotype Ptg. Co., Kansas City, Mo.

In the Supreme Court of the United States

THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

No. 108.

STATEMENT.

The original bill was filed by the District Attorney for Kansas on July 26, 1893. (pp. 2-6.)

On January 11, 1894, the defendant demurred to the bill (pp. 9-10) and on September 14, 1894, (p. 18) the court overruled the demurrer. The opinion is reported in 65 Fed. Rep., p. 903, and is printed in the record. (pp. 11-18.)

Afterwards the defendant answered (pp. 18-27); the complainant filed certain exceptions to the answer (pp. 27-29). These exceptions were sustained (p. 31); see memoranda opinion, (pp. 32-33.) The defendant filed an amended answer (pp.33-52), and by the usual replication issue was joined. (pp. 52-53.)

It being manifest that a great volume of testimony would have to be taken, and as the defendant had raised the serious question whether the United States could maintain the suit, or had the right, in its own name, and without a preliminary hearing before the interstate commerce commission, to enforce, by injunction, the provisions of the interstate commerce act which forbid discrimination, it was thought best to finally settle that question. Therefore, the stipulation on pages 53-54 was entered into. That stipulation provides for the filing of an amended bill, the levelling of a demurrer thereat, and an appeal or appeals to the United States circuit court of appeals and to this court. The amended bill was filed (pp. 55-60); the defendant demurred (p. 61); the court overruled the demurrer and the defendant, electing to stand on its demurrer, final decree was entered in favor of the complainant. (pp. 62-73.)

The substance of the amended bill is as follows:

"That this suit is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is given under and in pursuance of a request of the interstate commerce commission of the United States that the United States Attorney for the District of Kansas be authorized and directed to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate commerce law against the defendant in relation to the matters herein complained of."

The defendant, a railroad corporation, is a common carrier of all kinds of interstate freight between St. Louis, Missouri, and Omaha, Nebraska, and St. Louis, Missouri, and Wichita, Kansas, and between all points intermediate and beyond said cities of St. Louis, Omaha and Wichita on the line of defendant's road. That all such freight shipped over defendant's line between St. Louis to either Omaha or Wichita passes over the same track as far as Holden, Mo., a distance of 232 miles. From Holden the defendant has two lines—one of which runs in a

northwesterly direction to Omaha, the other in a southwesterly direction to Wichita. The distance from St. Louis to Omaha is 501 miles; from St. Louis to Wichita it is 458 miles. The freight traffic between St. Louis and Wichita over defendant's road is very large. St. Louis is a general distributing point, furnishes an extensive market for all kinds of traffic originating at and near Wichita, and but for the discrimination complained of there would be a largely increased business, and a more profitable trade carried on between the merchants of St. Louis and the people of Wichita and vicinage. That the defendant's road between St. Louis and Wichita, with its connections south and west, is one of the main thoroughfares for the freight traffic between the Mississippi river and the Pacific ocean and Gulf of Mexico. That the defendant has maintained and still maintains rules and regulations governing the freight traffic over its road between St. Louis and Wichita that unjustly and unreasonably discriminate against Wichita and in favor of Omaha, and against persons shipping freight and property between Wichita and St. Louis, and in favor of persons shipping freight between Omaha and St. Louis, and subject the locality in, about and tributary to Wichita, and the persons living therein, to an undue and unreasonable prejudice and disadvantage, by reason of the fact that the charges for freight service between St. Louis and Wichita are largely in excess of the charges made for like and contemporaneous service for the transportation of property between Omaha and St. Louis. That the service is rendered under substantially similar circumstances and conditions, and that said rates and charges collected and received by defendant for the shipment of freight between Wichita and St. Louis are unreasonable, excessive, exorbitant and unjust. That the rate of defendant on live cattle between Omaha and St. Louis is 17 1-4 cents per hundred weight, and on hogs 20 cents per hundred weight,

while the rate between Wichita and St. Louis is 28 3-4 cents per hundred weight on cattle, and on hogs 35 cents per hundred weight. That the rates charged by defendant between Omaha and St. Louis on other freight are as follows:

First class freight, 55 cents per cwt.
Second class freight, 40 cents per cwt.
Third class freight, 32 cents per cwt.
Fourth class freight, 25 cents per cwt.
Fifth class freight, 20 cents per cwt.
Class A, 22 1-2 cents per cwt.
Class B, 17 1-2 cents per cwt.
Class C, 15 cents per cwt.
Class D, 12 1-2 cents per cwt.
Class E, 11 cents per cwt.

That the rates between Wichita and St. Louis on the same classifications of freight are as follows:

First class freight, 115 cents per cwt.
Second class freight, 93 cents per cwt.
Third class freight, 78 cents per cwt.
Fourth class freight, 62 1-2 cents per cwt.
Fifth class freight, 53 cents per cwt.
Class A, 52 cents per cwt.
Class B, 39 1-2 cents per cwt.
Class C, 33 cents per cwt.
Class D, 27 cents per cwt.
Class E, 11 cents per cwt.

That said rates and charges constitute an unjust and unreasonable discrimination against persons shipping freight between Wichita and St. Louis and subject such persons, and the localities from which they ship, to an unjust and unreasonable prejudice and disadvantage, to the great hindrance and detriment of trade and commerce between St. Louis and Wichita, and the localities tributary thereto, and to the irreparable injury of the persons shipping from said points, and to the people of the United States.

It is then charged that any rates of freight between Wichita and St. Louis that exceed the rates charged for the same service between Omaha and St. Louis are excessive and ex-

orbitant "in and of themselves," and constitute an unreasonable discrimination against Wichita and the locality tributary thereto and the people living therein, and against persons shipping freight between the cities of Wichita and St. Louis, and subject such persons and localities to an unjust and unreasonable prejudice and disadvantage.

The demurrer to the amended bill is as follows:

"I. That it appeareth by the complainant's own showing by the said amended bill, that they are not entitled to the relief prayed by the amended bill against this defendant.

II. That the said amended bill is exhibited against this defendant for several and distinct and independent matters and causes which have no relation to each other, and in which, or in the greater part of which, this defendant is in no way interested or concerned, and ought not to be implicated.

III. That this defendant is not answerable to said complainants, but to some other persons, whose names it cannot state.

IV. That the said amended bill does not embrace the whole matter concerning which the suit is brought; wherefore this defendant may be harassed with other suits and a multiplicity of suits may ensue.

V. That it appears by the said amended bill that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto.

VI. That it appears by the said amended bill that the case of the said complainants is barred by the statute of limitations." (p. 61.)

POSITION OF THE APPELLANT.

In the lower courts the appellant, as we understand its position, insisted that the demurrer should have been sustained for the following reasons:

First. Because the amended bill does not contain any matter of equity whereon the complainant is entitled to any relief.

Second. Because complainant, under the interstate commerce act, has no authority to maintain this suit; that in any event the circuit court had no original jurisdiction of the suit; and that, even if the averments in the bill would otherwise entitle complainant to the relief prayed for, the grievances complained of must first be submitted to the interstate commerce commission and passed on by that body before the circuit court could entertain jurisdiction.

Third. Because the amended bill in charging that the traffic between St. Louis and Omaha and between St. Louis and Wichita was conducted under substantially similar circumstances and conditions, stated a mere conclusion of law; whereas it should have charged the detailed facts, so that the court, on considering the bill alone, could have determined therefrom whether or not the circumstances and conditions under which such traffic was conducted were "substantially similar."

Fourth. Because there was an adequate remedy at law for the wrongs complained of.

POINTS AND AUTHORITIES.

I.

THE DEMURRER ADMITS A VIOLATION OF THE LAW.

II.

THE PURPOSE OF THE ACT WAS TO COMPEL EQUALITY OF TREATMENT, TO PROVIDE A NEW REMEDY AND PRESERVE ALL EXISTING REMEDIES.

Interstate Commerce Commission v. Railway, 167 U. S., 479.

III.

PROCEEDINGS BEFORE THE COMMISSION ARE NOT EXCLUSIVE OF OTHER REMEDIES.

State ex rel. Matoon v. Railroad, 17 Neb., 648.
State ex rel. v. Telephone Co., 17 Neb., 126.
Lowry v. Railroad, 46 Fed., 86.
Railroad v. Railroad, 47 Fed., 771, 774.
Vincent v. Railroad, 49 Ill., 33.
Sutherland Stat. Const., Sec. 202.
Smith v. Stevens, 10 Wall., 321, 326.
United States v. County of Macon, 99 U. S., 590.
Mayor of Nashville v. Railway, 19 Wall., 475.

Thomas v. West Jersey R. Co., 101 U. S., 52.
South v. Maryland, 18 Hun, 402.
Hearne v. Insurance Co., 20 Wall., 493.
Amy v. City of Salina, 12 Fed., 414.
Oregon Short Line v. R. R. Co., 51 Fed., 465.
Osborne v. Railroad, 48 Fed., 49; S. C. 52 Fed., 912.
Railway v. Goodrich, 149 U. S., 680.
Kentucky Bridge Co. v. R. R. Co., 37 Fed., 565.
Wright v. United States, 167 U. S., 512.
Attorney General v. Railroad Companies, 35 Wis., 425.
Coal Company v. Coal Company, 88 Am. Dec., 537 (note).
2 *Morawetz on Corporations*, Sec. 1132.
Cumberland Valley R. R.'s App., 62 Penn. St., 227.
Sparhawk v. Railroad, 54 Penn St., 421.
State ex rel. v. Saline County Court, 51 Mo., 350.
State ex rel. v. Calloway County, 51 Mo., 395.
High on Injunctions, Secs. 1303, 1304, 1554.
Interstate Commerce Commission v. Railway, 167 U. S., 479.

IV.

EVEN IF THE COMMISSION HAS EXCLUSIVE ORIGINAL JURISDICTION OF COMPLAINTS MADE BY INDIVIDUALS, THE RULE DOES NOT APPLY TO THE GOVERNMENT.

Savings Bank v. U. S., 19 Wall., 239.
Swearingen v. U. S., 11 Gill & J., 373.
Commonwealth v. Baldwin, 1 Watts, 54.
United States v. Hoar, 2 Mason, 314.
People v. St. Louis, 5 Gilman, 351.
In re Debs, 158 U. S., 564.

V.

SECTION 12 SPECIALLY AUTHORIZES THIS SUIT.

Sutherland Stat. Const., Sec. 240.
Wilkinson v. Leland, 2 Pet. 627, 632.

VI.

REMEDIES SUMMARIZED.

VII.

CASES IN WHICH MANDATORY INJUNCTIONS HAVE BEEN GRANTED.

Great North. R. R. Co. v. R. R. Co., 1 Coll., 507.
Earl v. G. N. R. R. Co., 10 Hare, 664.
Corning v. Troy Rail. Co., 40 N. Y., 391.
Storer v. Great W. R. R. Co., 2 Y. & C., 48.
Wilson v. Furnace Co., L. R. 9 Eq., 28.
Sanderson v. Cockermouth Co., 11 Beav., 497.
Great Nor. Co. v. Manchester Co., 5 DeG. & S., 138.
Green v. West. C. Co., L. R. 13 Eq., 44.
Hood v. N. E. Co., L. R. 8 Eq., 666, on appeal.
Commonwealth v. Eastern, 103 Mass., 259.
Harris v. Cockermouth Co., 3 C. B., N. S., 693.
Mariot v. London Co., 1 C. B., N. S., 489.
Vincent v. C. & A. R. R. Co., 49 Ill., 37.
District Attorney v. Ry Co., 16 Gray, 442.
Atty. Gen. v. Boston Wharf Co., 12 Gray, 553.
Atty. Gen. v. Lee Co., 104 Mass., 244.
Atty. Gen. v. Cohoes Co., 6 Paige, 133.
Atty. Gen. v. R. R. Co., 1 Stock, 526.
Commonwealth v. R. R., 24 Penn. St., 159.
Georgetown v. Canal Co., 12 Pet., 98.
Atty. Gen. v. Street Ry. Co., 14 Grant (V. C.) Ch. 673.
Commonwealth v. R. Co., 24 Penn. St., 159.
Atty. Gen. v. Ry. Co., 1 D. R. & S. M., 154, 161, 162.
Atty. Gen. v. Leicester, 7 Beav., 176.

VIII.

EQUITY IS EQUAL TO EVERY EMERGENCY.

2 Red. on Rail., Sec. 205.
Taylor v. Simon, 4 Myl. & C., 14.
More v. Malachy, 1 Myl. & C., 559.
Wolworth v. Holt, 4 Myl. & C., 619-635.
Munn v. Ill., 94 U. S., 113.
Chicago, etc. Ry. Co. v. Ry Co., 47 Fed., 24.
Gay v. United States, 138 U. S., 1.
Atty. Gen. v. R. R. Companies, 35 Wis., 425.

IX.

THAT THERE MAY BE A REMEDY AT LAW TO PERSONS FOR DAMAGES IS NO DEFENSE TO THIS SUIT.

Atty. Gen. v. R. R. Co.'s, supra.
United States v. Baker, 1 Paine, 156.
12 United States Digest (first series) b. 745.

X.

THE BILL DOES NOT PLEAD CONCLUSIONS OF LAW.

The argument that the traffic between St. Louis and Omaha, and between St. Louis and Wichita was conducted under similar circumstances and conditions is one of fact, and not of law.

Commission v. Railway, 168 U. S., 144.
Daniell's Chan. Pl. & Pr., Vol. 1, *6th Am. Ed.*, p. 369.
Story Equity Pl., Sec. 253.
Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S., 194.
Interstate Commerce Commission v. Alabama Mid. R. Co., 168 U. S., 144.
Louisville & N. R. Co. v. Behlmer, 175 U. S., 648.

XI.

ALTHOUGH STRICTLY SPEAKING, THERE IS NO NATIONAL COMMON LAW; AND EVEN IF CARRIERS HAVE THE RIGHT AT THEIR OWN RISK TO MAKE RATES WHICH ARE PRESUMPTIVELY LAWFUL, YET THESE FACTS DO NOT AFFECT THIS CASE.

Interstate Commerce Commission v. Ry., 168 U. S., 144.

ARGUMENT.

I.

THE DEMURRER ADMITS A VIOLATION OF THE LAW.

Bearing in mind that the defendant, by its demurrer, admits that it has been and is charging and collecting from consignors and consignees of all kinds of freight between St. Louis, Mo., and Wichita, Kansas (a distance of 458 miles), more than twice as much as it has been and is charging and collecting for the same service between St. Louis and Omaha (a distance of 501 miles); and remembering, also, that it is likewise admitted that all this business was conducted "*contemporaneously and under similar circumstances and conditions,*" and for about one-half the distance over the same track, attention is invited to the provisions of the statute on which the bill is based.

Section one of "An Act to regulate commerce" provides:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in any connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section two provides:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and condi-

tions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section three provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The amended bill shows a plain and flagrant transgression of these three sections of the law. It further shows, that by such transgression, injury is done to the entire public tributary to or dependent on Wichita as a distributing point. From the bill it is certain that injury is done to a large part of the people of Kansas, Colorado and Oklahoma Territory by the violations of the act complained of; yet it is wholly impossible to estimate the damage to each person. It is shown that defendant is violating a public law to the injury of the public, that it is engaged in a business in which the public are interested; and that the injury complained of is irreparable. If the complainant is entitled to sue at all, the bill exhibits a case for equitable relief.

II.

THE PURPOSE OF THE ACT WAS TO COMPEL EQUALITY OF TREATMENT, TO PROVIDE A NEW REMEDY, AND PRESERVE ALL EXISTING REMEDIES.

The evils sought to be remedied by this statute are matters of general and public knowledge as a part of the history of the times, and are plainly set forth in the act itself.

The purpose of congress was to regulate common carriers engaged in interstate commerce, to provide another remedy for the evils of which there was such loud complaint, and as stated by this court, to secure to all shippers equality of treatment.

Interstate Commerce Commission v. Railway, 167 U. S., 479.

The act prohibits the charging of unreasonable rates for the transportation of passengers or property, or for receiving, delivering, storing or handling such property.

It places all persons upon an equality for like and contemporaneous service in the transportation of like kind of traffic under substantially similar circumstances and conditions. Unequal charges, whether greater or less, are prohibited and declared to be unlawful.

Undue or unreasonable preference or advantages to any person, or any particular description of traffic, are declared to be unlawful; and it is likewise declared to be unlawful to subject any *locality*, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage whatsoever.

Applied to this case these are the principal evils for which the act seeks to provide a remedy. The interstate commerce commission was created for the purpose of aiding in enforcing these provisions; and one course of procedure which may be followed under the act is to file a complaint before the commission against any common carrier who violates its provisions; *but this course is not exclusive, and other methods of procedure and other remedies are provided.*

Section 9 provides:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own benalf for the

recovery of the damages for which such common carrier may be liable, under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of such remedies and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

There is no way in which this provision can be interpreted in harmony with the construction of the act contended for by the appellant. The act says that any person may make complaint to the commission, or may bring suit for damages in the district or circuit courts, but shall not do both. The fact of filing a complaint before the commission would be a complete defense to an original action in the circuit or district courts for the same injury.

Here are two remedies provided by the act for the redress of a private injury. Either may be followed, but not both.

The amendatory act of March 2, 1889, (25 Stat. L. 855) provides:

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ."

The amendment further provides that the remedy by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by the act, or the act to which it is a supplement. It has already been seen

that the original act carefully preserved all remedies existing by common law or by statute.

It is a settled rule of statutory construction that all parts of a statute must be construed together, and if possible, all must be given force and effect. Under the construction contended for by appellant, an application for a writ of mandamus could not be made under the provisions of the amendment to the act just quoted, unless the person applying for the writ had first submitted his grievance to the commission.

If the act is construed according to the plain import of its language, it does not seem possible to reach the conclusion contended for by appellant's counsel.

Under the provisions of section 9, and also under the provisions of the amendatory act of March 2, 1889, there is no room to doubt that proceedings may be instituted in the courts against any common carrier subject to the provisions of the interstate commerce act for a violation of its provisions, by any person who has been injured, without first making complaint to the commission. Further, it is clear that if complaint is first made to the commission, then the remedy must be sought through that channel alone; and in such case, the courts can be reached only through the commission—a direct appeal to the courts being prohibited.

If the argument of the appellant is sound, the provisions of the law which preserve all existing remedies, and make the remedies provided by the act cumulative, have no meaning.

If congress intended to regulate every one having a grievance against a carrier to the commission; if the act (Sec. 13), in declaring that every person, etc., *may* apply to the commission by petition; if the act in providing that the commission, on its own motion, *may* investigate violations of the law; or if the permissive authority granted by section 16, to the effect that any person *may* apply to a court to enforce an order of the

commission, bars all other relief, then *all* violations of the law *must* first be submitted in the commission, *and the party aggrieved must depend for his remedy on the commission finding in his favor; for if such finding be adverse to him, whether just or unjust, he is without further remedy—the philosophy of the argument being that the courts have jurisdiction only to enforce the findings of the commission.* Suppose the case of the court declining to enforce a finding—then the aggrieved party would again be without any remedy whatever.

Such a construction would nullify a great part of the act, and strike down some of the most effective remedies therein provided. It would be a mockery to hold that the tedious and futile process required by such a construction would provide for the injured party "an easy, speedy and inexpensive" remedy.

III.

PROCEEDING BEFORE THE COMMISSION ARE NOT EXCLUSIVE OF OTHER REMEDIES.

The position upon which defendant mainly relies is that the circuit court had no jurisdiction; that the matters complained of must be submitted to, and passed on, by the commission before that court could protect rights secured by, or redress or prevent violations of, the interstate commerce act. We have not been able to find any case in which a federal court has passed on this precise question. In the able brief submitted on behalf of the appellant in the circuit court of appeals the only case cited which is at all in point is *State ex rel. Moore, et al. v. Railroad Co.*, 27 N. W. Rep., 437, decided by the supreme court of Nebraska. That was a petition for a mandamus to compel the defendant to stop its trains and to build such suitable depots, sidetracks, switches and cattle guards

on its line of railroad at North Side as would reasonably accommodate the public and conform to the requirements of the law. The court held that under the act of the legislature of Nebraska, which took effect June 6, 1885, creating a railway commission, the relator had a plain and adequate remedy at law which did not exist prior to the taking effect of said act, and on that ground denied the writ. The case shows very little investigation or consideration, and in view of the fact that the same court, prior to this decision, had decided that the writ of mandamus was a proper remedy in such cases, the correctness of this decision may well be doubted, even if there was nothing in the Interstate Commerce Act to make it inapplicable. The same tribunal, prior to the act creating the railroad commission in that state, had passed upon the same question in *The State ex rel. Matoon v. Railroad*, 17 Nebraska, 648, in which case, after full argument, it is squarely decided that the court had power and jurisdiction by mandamus to compel railways as common carriers to furnish suitable warehouses or depots at all appropriate points on their lines for the receipt and discharge of passengers and freight.

This decision was placed upon the ground that the right to build and operate a railroad, and to charge and take tolls and fares, is a prerogative granted by the state; that public utility is the consideration for such grant, and although a railroad franchise may be in the hands of a private corporation, it is still a sovereign franchise and must be used and treated as such, and must be held in trust for the general good.

It is also held that in the use of such franchise all citizens have an equal interest and equal right, and all must, under the same circumstances, be treated alike, without unjust discrimination against any.

The court further decided that the duty thus imposed grew out of and rested upon the principles of the common law, and might be enforced in the absence of statutory requirements.

See also *The State ex rel. v. The Nebraska Telephone Co.*, 17 Neb., 126, where the authorities are quite fully collated.

The last case cited was one in which the relator had applied to be admitted as a subscriber of respondent, and was refused. Relator tendered a full compliance with all the rules of the company, his place of business was accessible, and no reason was shown why his request should not be granted. It was held that the telephone is a public servant in the commerce of the country, and that respondent, having undertaken to supply the demand, must supply all alike, without discrimination, and that having undertaken to supply the demand in the City of Lincoln, wherein relator resided, and being fully able to furnish him with a telephone instrument the same as its other subscribers, it was its duty to do so.

The decision relied on by appellant is in direct conflict with the well settled rule of statutory construction. The act creating the commission in that state did not make the remedy provided thereby exclusive, and the court before its passage had decided that there was a remedy existing at common law.

Turning to the "Act to regulate commerce," it is found that Sec. 22, as amended, among other things, provides:

"And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In commenting on this provision in the case of *Lowry v. Railroad*, 46 Fed Rep., 83, at page 86, the court said:

"The law would have been the same independently of this provision. The rule is that where a statute gives a remedy

in the affirmative (without a negative, express or implied) for a matter which was actionable at common law, this does not take away the common law remedy, but the party may still sue at common law as well as upon the statute."

JUDGE HAMMOND, in discussing the question of jurisdiction in the case of *Railroad v. Railroad*, 47 Fed. Rep., 771, 773, 774, said:

"The argument for the demurrer proceeds, however, upon the theory that the jurisdiction of the court here is limited by the provisions of the Interstate Commerce Act prescribing certain remedies which may be taken in this court for its enforcement. It is hardly necessary to decide that question; but, if it be, there can be but little doubt that the plenary jurisdicion of this court to entertain all controversies arising under an act of congress, either at law or equity, has not been abbreviated by this act in relation to controversies arising under it, but the special remedies so far as they are special are merely supplementary to the ordinary remedies existing under the subsisting judiciary act which governs all our jurisdiction. This is fairly inferable, if not directly decided, from the decision of Circuit Judge Jackson, just cited, (*Kentucky & Indiana Bridge Co. v. Railroad*, 37 Fed., 567, 615); and in my judgment there can be no doubt of this, whether it has been so decided or not. Whatever jurisdicion a court of equity may entertain of this controversy may be entertained here, if not under the regulations of the interstate commerce act, prescribing certain remedies, then under the judiciary act, giving us the power of an equity court as to all cases and controversies arising under any act of congress."

See also *Sutherland on Stat. Const.*, Sec. 202.
Vincent v. Railroad, 49 Ill., 33.

The act itself, however, plainly shows that Congress did not intend to deprive anyone—much less the government—of any remedy then existing. By authorizing the procedure before the commission, congress intended to create another remedy for the benefit of the citizen; it intended to bring into existence another tribunal with power to abate the evils the law denounced—with jurisdiction to decide that a wrong ex-

isted, and the right to appeal to the courts to prevent disobedience of its order.

The rule enunciated in Sections 204, 325, 326, of *Sutherland on Statutory Construction* do not affect the question. The author, in those sections discusses, first, the distinction between *affirmative* and *negative* statutes; and, second, the application, in the construction of statutes, of the maxim, *expressio unius est exclusio alterius.* The class of statutes referred to in Sec. 204 of his work is well illustrated in *Smith v. Stevens,* 10 Wall., 321, 326, (one of the authorities cited by the author). There congress had provided a method of sale of lands granted to certain Indians. The court held that the act "by necessary implication, prohibited their sale in any other way." But that is a totally different proposition from that advanced by the appellant, which is that because Congress granted parties the right of proceeding before the commission it thereby deprived them, *and also the government,* of all other remedies.

In the other sections the author touches only that class of statutes in which the legislature, dealing with matters not before recognized in the law, enacts that certain things may be done on the happenings of certain contigencies. For example, this court, in *United States v. Ranscher,* 119 U. S., 407, after stating that the common law did not permit the surrender by one government to another of fugitives from justice, held that the Ashburton treaty forbade the extradition of a person for a crime not mentioned therein. That is to say, the treaty by stating that for either one of seven crimes extradition might be had, did not mean that it could be had for other crimes not named.

United States v. County of Macon, 99 U. S., 590.
Mayor of Nashville v. Ray, 19 Wall., 475.
Thomas v. West Jersey R. Co., 101 U. S., 52.
South v. Maryland, 18 How., 402.
Hearne v. Insurance Co., 20 Wall., 493.
Amy v. City of Salina, 12 Fed., 414.

It is unnecessary, perhaps, to add other authorities, as those already cited utterly demolish the "special tribunal" theory of the appellant. The rule contended for is contrary to the general practice of the courts. It is a matter of general and common knowledge that suit after suit has been brought under the provisions of the Interstate Commerce Act without first submitting the matters complained of to the commission. Actions in replevin have been brought to recover goods from railroad companies, (after a tender of what was considered to be reasonably due for the transportation of such goods) on the ground that the freight and charges demanded by the railroad companies were unreasonable. Injunction suits against railroad companies have been commenced by other railroad companies and by private parties, and no doubt was suggested or expressed as to the jurisdiction of the court, in an original suit, to grant an injunction to prevent violations of the Interstate Commerce Act, where the averments of the bill, or the facts established by the proof, showed that the act was being violated. In *Oregon Short Line and Utah Northern R. R. Co., v. Northern Pacific R. R. Co.*, 51 Fed. Rep., 465, a mandatory injunction theretofore issued to enjoin defandant from unlawfully discriminating against complainant was dissolved on the ground that no unlawful discrimination was shown. No question whatever was raised as to the jurisdiction of the court, or as to injunction being the proper remedy where a case of unlawful discrimination was shown. (See, also, Judge Deady's dissenting opinion, page 477.)

Osborne v. Railroad, 48 Fed., 47, s. c., 52 Fed., 912.
Railroad v. Railroad, 47 Fed., 771.
Union Pac. Ry. Co. v. Goodridg's, 149 U. S., 680.
Kentucky, etc. Bridge Co. v. Railroad, 37 Fed., 565.

On page 627 of the case last cited, it appears that the question of rates had not been passed upon by the commission,

but the court, notwithstanding that fact, took up the question and decided it.

Independent of the well settled rule that the government is not limited to the special remedies provided by statute, unless by the express terms of the act, and of the practice of the courts that the remedy for a violation of the act is not confined to a proceeding before the commission in the first instance, and then by application to the courts to enforce the finding of the commission, the language of the act plainly provides for a direct and original application to the court; it provides for and authorizes suits for damages, and writs of mandamus independent of the commission; *and it is only where a person seeking redress has complained to the commission that he is prohibited from seeking in the courts, in the first instance, his remedy for the same injury.*

The argument that the commission has exclusive original jurisdiction of all matters or questions arising under the act, applies with as much force to section 9, which authorizes a suit for damages to be brought, where complaint is not first made to the commission, and also to the amendatory act of March 2, 1899, which authorizes any person to apply for a writ of mandamus, as it does to any other provision of the act.

If the position of appellant that the commission has original exclusive jurisdiction of all matters growing out of the act is true as to the act generally, it is none the less true as to section 12, under which the present suit is brought.

But what we claim is, that it was the purpose and intention of Congress to provide and afford every possible remedy known to the law for the enforcement of the provisions of the act. All the terms of the act plainly show this. The violation of its provisions is made a crime, and no one would be bold enough to contend that the commission must first determine

whether any person was guilty of a criminal offense, as defined in the act, before he could be indicted and tried for such offense. (*Wright v. United States,* 167 U. S., 512.) The fact that a violation of the provisions of the act is made a crime, shows how fixed was the intention of Congress to use every means within its power to secure its enforcement.

The act provides that complaints may be made to the commission. It provides that the commission may institute inquiries independent of complaints. It authorizes the commission to apply for a writ of mandamus to compel a common carrier subject to the provisions of the act to comply with the provisions thereof, and it provides that the commission may apply for a writ of injunction to restrain such common carriers from doing business until they comply with the act. It provides that where an order or finding is made by the commission, and such order or finding is not complied with, the commission, or any person interested in the order or finding, may apply to the proper circuit court, sitting as a court of law or as a court of equity, as the case may be, to enforce the finding or order.

It provides that in case any common carrier subject to the provisions of the act shall do, cause to be done, or permit to be done, any act, matter or thing in the act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in the act required to be done, such common carrier shall be liable to the person or persons injured thereby, for the full amount of damages sustained in consequence of any such violation, together with a reasonable counsel or attorney's fee, to be fixed by the court, and taxed as costs in every case of recovery.

The act leaves it in the discretion of any person who claims to be damaged by any common carrier subject to its provisions, to proceed either by way of complaint to the com-

mission, or by suit in his own behalf for damages, in any district or circuit court of competent jurisdiction. The only limitation is, that both the complaint to the commission and suit for damages shall not proceed in the same case.

Section 9 refers to distinct and separate remedies, one by way of complaint to the commission, and one by way of action for damages in the court. Its language is:

"But such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

The act further provides that the circuit and district courts shall have jurisdiction upon the relation of any person or persons, firm or corporation alleging a violation by a common carrier of the provisions of the act, to issue a writ of mandamus against such common carrier; and that seperate, distinct and independent remedies were intended to be provided, and were provided, by the act, is shown in the plainest possible manner by the proviso to the amendatory act of March 2, 1889, which is as follows:

"*Provided*, That the remedy hereby given by the writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act, or the act to which this is supplemental."

The language is, "shall not be held to exclude or interfere with other remedies," not remedy.

How can the conclusion be avoided that "An act to regulate commerce" provides separate, distinct and independent remedies, and that for violations in certain instances, one and only one remedy is to first make complaint to the commission?

The contention that the United States, by the act in question, is denied the power or right to prosecute this suit, and that the matter complained of could only be brought to the at-

tention of the courts after it had been presented to the commission, is a concession that but for the act the suit could have been maintaned. In other words, the claim is that the mandate of the constitution (Art. 2, Par. 3) "that the president shall take care that the laws be faithfully executed," if not abrogated, was limited and restricted when congress exercised its constitutional right to regulate commerce among the states. He who puts forth such a claim ought to be able to sustain it by clear and specific authority.

It may be conceded that the commerce act erected a new code of duty for carriers, and forbade certain practices permissible at the common law. But this premise does not at all support the conclusion that because congress called the commission into being, and clothed it with certain administrative and quasi-judicial powers, the duty of other officers of the government to enforce *all* the laws, by any recognized or competent method, was changed. The fallacy of the position of the appellant is clearly exposed by assuming the statute to exist as it reads, minus those parts that create the commission and define its powers and duties. In that case the argument concedes the right to correct the wrongs complained of in the manner attempted by this bill.

The force of these considerations is not impaired by the quotations from the commission printed in appellant's brief in the lower courts. The statement that the commission was created to exercise the constitutional power conferred on congress to regulate commerce does not admit that that power was *exclusively* conferred; nor did the commission, by pointing out that the act created a new standard of right and wrong, give either aid or countenance to the theory that that standard could only be enforced in one manner.

It is equally aside the question that the commission has taken cognizance of claims for damages growing out of viola-

tions of the act, or that this is the first instance in which that body has requested the law department of the government to bring suit in the name of the United States to restrain defiance of the law. It might, with equal force, be argued that the right did not exist because congress did not exert its power to regulate commerce for more than an hundred years, or that the courts are without power to restrain frauds on the patent office because it has been the custom to leave citizens injured thereby to redress their own wrongs.

It is, perhaps, unnecessary to additionally show that the position of appellee is also impregnable in the light of the decided cases. At the risk, however, of being prolix, we have concluded to show, as briefly as possible, that the right assumed rests on indubitable and controlling authority.

In *Attorney General v. The Railroad Companies*, 35 Wis., 425, the attorney general of the state filed an information in the supreme court for an injunction to restrain certain railroad companies for excess or abuse of corporate franchises, and a violation of public law, to the public detriment.

The case was elaborately argued, and the question of the right to an injunction, as a remedy for the wrongs complained of, was fully discussed and considered, both in the briefs and the lengthy and able opinion of the court.

It was argued that there was an adequate remedy at law, by way of an information in the nature of *quo warranto*, to forfeit the charter of the corporation.

In reply to that argument, the assistant attorney general, on behalf of the state, said:

"The argument that there is a remedy at law, is answered in several English cases, as follows: The information in the nature of *quo warranto* to forfeit the charter of a corporation, is in the nature of punishment, and the proceeding was formerly regarded as strictly criminal, and is still *quasi* criminal. But the remedy by injunction is for the prevention of injury,

and not for punishment. As argued by Sir Samuel Rumley, in *Att'y Gen'l v. Cleaver,* 18 Ves., 214: 'The ground of the application is not that the act is a crime, but that it occasions irreparable injury to several persons. The defendants, in order to succeed, must establish the principle that because the act is a crime, it is entitled to favor and protection in a court of equity.' "

Here follows a long list of citations; and following the citations, the argument proceeds:

"It is to be collected from all these cases, that where the exercise of powers and privileges not granted by law to a corporation works a public injury, equity, at the suit of the attorney general, will restrain the repetition of such acts, but will not interfere at the suit of the attorney general, where only private interests are affected; and that in these latter cases, the writ is denied, not because the court has no jurisdiction, but because no proper cause is made out for its exercise." (pp. 507, 508.)

RYAN, C. J., in delivering the opinion of the court, says:

"But equitable jurisdiction of such information was denied. It was argued that courts of equity had no jurisdiction at the suit of the attorney general to enjoin usurpation, excess, or abuse of corporate franchises.

"This question was argued very ably and at large, and has been carefully considered, although we had no difficulty in coming to the conclusion that courts of equity have such jurisdiction, and that it is a very beneficial jurisdiction, almost essential to public order and welfare." (p. 532.)

* * * * * * * * * *

"But if this court can enjoin, it can do so without regard to any remedy at law; and the attorney general has a right of election to resort to the more lenient remedy of injunction, in preference to the harsher and more dangerous experiment of forfeiture. (p. 524.)

"*When any corporation is doing acts detrimental to the public welfare, or hostile to public policy,* the right of the attorney general to interfere on these grounds was fully established in *Attorney General v. Great North. Ry. Co.,* where the defendants had engaged in an illegal trade in coals. It was objected that it was not competent for him to file an information. But Kindersley, V. C., says: 'On this point I entertain no doubt whatever. Whenever the interests of the public

are damnified by a company established for any particular purpose by act of parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function of the attorney general to protect the interests of the public by an information; and that when, in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the attorney general, in cases of injury to public interests from such a cause, to file an information for an injunction.' "

The jurisdiction of the court was maintained on purely equitable grounds, and it was argued and shown that the courts of England did not exercise jurisdiction in such cases in consequence of any statutory provisions, but squarely upon the general rule governing and controlling courts of equity. (Pages 525 to 528.)

In Mr. Freeman's note to the case of *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.*, 88 Am. Dec., 537, he draws the distinction between a bill in equity to compel a corporation to perform its duties to the public, and a suit to restrain a corporation from violating its charter and public duties, or to enjoin it from committing a public nuisance. He says:

"While suits of the latter class," (*i. e.* to restrain a corporation from violating its charter and its public duties, or to enjoin it from committing a public nuisance) "are unquestionably maintainable, and are in fact very common, the power of courts of equity to entertain suits of the former class is not so certain."

In the same note is a quotation from the opinion of Lord Cairns, in the case of *Att'y Gen'l v. Mid-Kent Ry.*, L. R., 3 Ch., 100, as follows:

"It was pressed upon us that there was a sufficient remedy at law by mandamus, and that where there is a sufficient remedy at law this court does not interfere by way of injunction. It is true that in many cases where the injury has been trifling, where there has been improper delay, or where the in-

jury is transitory, this court has left the complainant to his remedy at law. That was on the ground that there were two concurrent remedies, an action for damages and a suit for an injunction, and that damages would meet the justice of the case. Here the argument is, that the attorney general could obtain from a court of law a mandamus having the same effect as a mandatory injunction, and that we are to refuse to interfere in a case where the court clearly has jurisdiction, merely because the same relief can be had in another court.

"Ordinarily, a bill in equity is not the proper remedy to compel a corporation to perform its public duties. But if a corporation should threaten to violate a duty which it owes to the public, any member of the public who would suffer an immediate injury, for which there is no adequate remedy, may restrain the threatened wrong by injunction. So the state may sue in equity to prevent a corporation from violating its duties to the injury of the public, if there is no other practicable remedy."

2 *Morawetz on Corporations*, Sec. 1132.
Cumberlands Valley Railroad's App., 62 Pa. St., 227.
Sparhawk v. Union Passenger Ry., 54 Pa. St., 421.
State v. Saline Co. Court, 51 Mo., 350.
State v. Calloway Co., 51 Mo., 395.
High on Inj. (2nd Ed.) Secs. 1303, 1304, 1554.

In *Interstate Commerce Commission v. Railway*, 167 U. S., 479, it is ruled that the powers of the commission are judicial and administrative, but not legislative, and that it has no power, after determining judicially that an existing right is unreasonable, to prescribe a rate to control the future, and to enforce such right by mandamus. But the court, quoting from the brief of appellees, says: "Article 2, Section 3, of the constitution, ordains that the president shall take care that the laws be faithfully executed. The act to regulate commerce is one of these laws. The first section (of the act to regulate commerce) simply enacted the common law requirement that all charges shall be reasonable and just. For more than one hundred years it has been the duty of the courts to execute and enforce this common law requirement." (p. 501.)

IV.

EVEN IF THE COMMISSION HAS EXCLUSIVE ORIGINAL JURISDICTION OF COMPLAINTS MADE BY INDIVIDUALS, THE RULE DOES NOT APPLY TO THE GOVERNMENT.

Independent of the tact that the act preserves the remedies existing at the time of its enactment, the rule contended for by the appellant has no application to the present suit. It is conceded, as a general proposition, that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is usually exclusive of all common law remedies. But that rule has no application to the government. Where the government interferes to protect public rights, it is limited, neither as to the remedy it will pursue nor the tribunal to which it will resort, unless the express words of the statute impose a limitation.

In *Savings Bank v. United States*, 19 Wall., 227, 238, 239, 240, Justice Strong states the rule with great force and clearness. He says:

"It must also be conceded to be a rule of the common law in England, as it is in Pennsylvania and many of the other states, that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common law remedies. But it is important to notice upon what the rule is founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. But by the Internal Revenue law, the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the government. They may be obliga-

tory upon tax collectors. They may prevent any suit at law by such officers or agents. But they are not rules for the conduct of the state. It is a familiar principle that the king is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. (Magdalene College Case, 11 Reports, 74; *King v. Allen,* 15 East, 333.) He may even take the benefit of any particular act, though not named. (Case of a Fine Levied, etc., 7 Reports, 32; Pott. Dwarris, 151, 152.) The rule thus settled, respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the federal courts. It may be considered as settled that so much of the royal prerogative as belonged to the king in his capacity of *parens patriae,* or universal trustee, enters as much into our political state as it does into the principles of the British constitution. * * * The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason."

Whatever rights or remedies existed in favor of the state or sovereignty in controlling common carriers or enforcing such regulations prior to the passage of the Interstate Commerce Act still exist in favor of the United States. Every presumption is in favor of the government. A statute will not be construed to limit or restrict the government, unless the express words of the enactment require it. It is a settled rule of the English law that the king may sue in what court he pleases, and it is a settled rule in the United States that such parts of the royal prerogative as pertain to the king as *parens patriae* are apportioned between the states and the general government.

Savings Bank v. U. S., 19 Wall., 239.
Swearingen v. U. S., 11 Gill. & J., 373.
Commonwealth v. Baldwin, 1 Watts, 54.
United States v. Hoar, 2 Mason, 314.

It is upon the principle that the state or the government is the universal trustee for its citizens, that suits to protect

public rights are authorized and instituted. Obstructions placed in navigable streams are abated by injunction on suit of the United States. Such obstructions, by interfering with commerce, are held to be public nuisances. The right to enjoy the benefits of interstate commerce is a right common to each and every citizen of the United States. It is a public right, within the control of congress, and when the instrumentalities engaged in such commerce proceed in violation of the laws of the United States regulating interstate commerce, to the public injury, the United States, as *parens patriae,* as the universal trustee of the citizens, has a right to interfere to prevent a violation of the public law to the public injury, such right is inherent in sovereignty. And where it has such a right, unless limited and restricted by the express words of the statute, the government cannot be limited in the choice of remedies.

The writ of injunction has been a recognized remedy in a suit on behalf of the state to prevent corporations from violating public laws to the public injury; and it is impossible to perceive why it is not appropriate to enforce the regulations which congress has provided for common carriers engaged in interstate commerce. Where the violation of the law affects a whole community, not only in one state, but in several states, as shown in the present bill, where it affects a large portion of the people of the state of Kansas, and of the Oklahoma territory, and of the state of Colorado, the present proceeding is the only one which affords a plain, speedy and adequate remedy.

Section 3 of the act prohibited the defendant from subjecting the "locality" of Wichita "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The bill shows and the demurrer admits a violation of this provision of the law. Opposing counsel say the only way in which the admitted unlawful act of their client may be re-

strained is for some one who has actually suffered a pecuniary loss by reason thereof to apply to the commission to inquire into it. According to the logic of this argument the United States must even await a finding by the commission that the act has been violated before proceeding by criminal prosecution to punish the offender, and that it is helpless to vindicate the law in a civil proceeding, because the public treasury has not been despoiled. The predicate of this position apparently is, that at common law the appellant might charge the same man twice as much for hauling a bushel of corn from Wichita as it charged him for transporting it from Omaha—the distance, conditions and circumstances and cost of the carriage being the same in each instance. We deny the truth of the predicate—but admitting it, and assuming that the commerce act alone forbids such a palpable discrimination—it ought not to be and it is not true that the government is so barren of power, so destitute of authority, as to be unable to enter the portals of its own courts and demand process to prevent gross wrong to the inhabitants of a *locality,* in respect of a matter wholly within the purview of national law. Such a narrow view of governmental power is wholly inadmissable. To say that the United States must look within the covers of the commerce act for authority to enforce the provisions thereof is the same as saying that the government has no authority to enforce a statute except that which it confers upon itself by written law. The establishment of such a doctrine would wholly pervert the function of government. The provisions of the commerce act which this suit seeks to enforce against the defendant are well within John Austin's famous analysis—*i. e.* it is a *command* issued by a superior to a subject. The government alone can enforce that command, in respect to the facts before the court. The "*locality*" of Wichita is not a legal entity that can go into court to collect damages for or to prohibit discrimination practised on its denizens by the defendant carrier.

No individual—even if he has the right—can adequately redress the wrong complained of. The commission may inquire into it, but is powerless to abate it, except through the courts. Assuming—as the court must—that the law has been violated in the "locality" described in the amended bill, how otherwise than by such a proceeding can the wrong be adequately prevented in the future? This is not an attempt to judicially establish rates—it is not an attempt to interfere with the primary right of the defendant to determine the price at which it shall transport over its lines the products of the farms of Kansas and Nebraska—it is simply an effort by the plaintiff to prevent the defendant from charging the Kansas farmer twice as much per ton per mile for hauling his cattle as it charges the Nebraska ranchman for hauling his. To contend that the United States has no power to prevent such conduct—forbidden as it is by positive enactment—is to argue that our government is destitute of the one power that is indispensable to its existence. If it has not this power, it will and ought to die. We believe it was Austin who said that the existence of government, with power to enforce its laws, is necessary to the conception of society. And that this power is inherent, and does not require to be written in each law as it is enacted, or in any law at all, is self-evident. The exercise of this power for the advantage of the whole or a part of the people, or rather the degree in and the vigilance and energy with which it is so exercised, is the test by which the worth of the government should be measured. As said by many writers, the enforcement of law is a duty which the sovereign power must, of absolute necessity, take upon itself. That duty is not conferred by statute—it is an attribute of government. This is true within any definition of the term ever asserted or formulated. Even Herbert Spencer's restricted conception of the functions of government conceded that its essential duty was to protect the citizen in his right to life, personal liberty and property.

The late Mr. Justice Bradley, in his article "Government," (Vol. 3, Supp. Ency. Brit.) holds that "civil society can only exist where the rules made for the conduct of its members are forcibly carried out. * * * It is of the essence of civil society to be governed by rules that are enforced, and rules can not be enforced without some agency to enforce them, and that agency we call government." The learned writer proceeds, from this text, to unfold his conception of government and its powers; but nowhere does he express doubt of its inherent power to enforce law, or anywhere suggest the necessity of an enabling act such as opposing counsel have argued is necessary to the maintenance of this suit.

To proceed by way of the commission would cause great delay, and if the averments in the bill are true, irreparable injury; irreparable both because of the magnitude of the injuries inflicted, and because it is impossible to estimate them in damages.

After the commission has passed upon the question, the case would be no nearer the end than before, for such findings would still require a proceeding in the courts for their enforcement, which would subject the citizen to unreasonable delay, and result in a practical denial of justice. There is no adequate remedy by a suit for damages on the part of individuals. Every citizen of that portion of the United States in any way tributary to Wichita, by the exorbitant charges of defendant, is damaged to a greater or less extent, the amount of which no one can definitely state. So it is an invasion of a public right which is intrusted to the keeping of complainant; and complainant, as trustee of such right, is warranted and justified in interfering to prevent appellant from violating such rights as are conferred and secured by the act.

It is insisted, first, that there is no plain, speedy and adequate remedy at law; and second, that complainant is not limited by that rule, when it interferes to protect a public

right or prevent public injury, where such right is intrusted to its keeping.

Savings Bank v. United States, supra.
Attorney General v. Railroad, supra.

If the United States has any rights as against appellant, or is charged with any duties to the public in enforcing the Interstate Commerce Law, or in preventing the violation of such law to the injury of the public, whatever remedies may exist for such enforcement, or to prevent such violation, are open to it, independent of any question of an adequate remedy at law, and independent of the existence of any special tribunal.

"Injunction will lie to prevent threatened acts which would amount to a public or private nuisance, although a legal remedy exists by criminal prosecution."

People v. City of St. Louis, 5 Gil., 351.
Savings Bank v. United States, supra.
Attorney General v. Railroad Companies, supra.
In re Debs, 158 U. S., 564.

While we insist that there is no adequate remedy at law for the injuries complained of in the bill, yet in a suit on behalf of the government, the fact that there is a remedy at law constitutes no defense. These rules do not apply to sovereignty. Whatever, in the statute, may be construed to confer rights, or to give authority to complainant, will be construed in its favor; and there being no express words prohibiting it from maintaing such a suit, nothing can be construed against it, under the statute in question; and whatever remedies may be applied for the prevention of the wrongs set forth in the bill, choice of such remedies is open to complainant. This would be true as applied to the government, if the statute itself was silent; but by the plain language thereof such remedies are preserved.

In *re Debs,* 158 U. S., 564, sets at rest the question of the right of the United States to maintain this suit. As is well known that was a suit, brought as this was, (except that the commission did not request it) in the name of the United States. The defendants there were charged with obstructing interstate commerce and the transportation of the mails. The supreme court unanimously upheld the jurisdiction, and applauded the action of the officials who invoked the peaceful authority of the courts rather than the mailed hand of force. Mr. Justice Brewer, after showing the exclusive authority of the general government over interstate commerce, and pointing out that congress had passed a variety of acts in relation to such commerce—notably the act and its amendments here involved—says: (page 581.)

"As, under the constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and congress, by virtue of such grant, has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of congress to prescribe by legislation that any interferences with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it."

After stating that the freedom of such commerce may be enforced by criminal prosecution or by the exercise of physical force, and showing the possibility that the evil would not thereby be effectually remedied, he proceeds: (page 582.)

"The existence of this right of forcible abatement is not inconsistent with, nor does it destroy, the right of appeal, in an orderly way, to the courts for a judicial determination, and an exercise of their powers, by writ of injunction and otherwise, to accomplish the same result."

The following is sufficient answer to the position of appellant that the complainant has no interest in the subject matter of the suit: (page 583.)

"Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit."

And, says the learned justice: (page 584.)

"Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interests of all and to prevent the wrong doing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

After citing *U. S. v. San Jacinto Tin Co.*, 125 U. S., 273, and *U. S. v. American Bell Telephone Co.*, 128 U. S., 315, to show that the doctrine is not a new one, it is said: (page 586.)

"It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as effect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

With marked approval the opinion quotes from 133 Mass. these words: (p. 589.)

"The rights of fishing, boating, bathing and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. • • •

If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney general to restrain and prevent the mischief."

And this from *Gilman v. Philadelphia*, 3 Wall., 713 (p. 590):

"Wherever commerce among the states goes, the power of the nation, as represented in this court, goes with it, to protect and enforce its rights."

In summarizing the conclusions arrived at it is said: (p. 599.)

"We hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that, while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty, that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority."

The functions of the commission are administrative and judicial, not legislative; (*Interstate Commerce Commission v. Railway*, 167 U. S., 479) and yet it is claimed that the national government—the power that created the commission—the repository of the constitutional grant of power—by conferring

these functions upon the commission—robbed itself of the right to act directly—was guilty of self spoliation—and is now helpless to restrain the perpetuation of lawless acts by carriers, and powerless to protect the public in the enjoyment of that equality of treatment that congress declared it should enjoy. Clearly this contention is untenable.

V.

SECTION 12 SPECIALLY AUTHORIZES THE SUIT.

It will be seen from the foregoing that no single remedy was intended by congress, but that every remedy that the law could afford was intended to be provided.

It is submitted that the distinct and independent remedies hereinbefore pointed out are plainly provided for by the act. And, in addition thereto, section 12 gives a further remedy, and that is the remedy sought to be applied by the pending suit. Section 12 provides:

"That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the object for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; *and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply, to institute in the proper courts, and to prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States,*" etc.

It is said that the power conferred on the commission by section 12 does not enlarge the power given by previous sec-

tions to primarily investigate the facts, and to enforce the provisions of the act by applying to a court to enforce an order already made. But if that be so, the italicised part of section 12 was unnecessary, for without it, the commission had all the power yielded to it by counsel. If the purpose was to exclude every one, including the United States, from complaining to the courts direct—if the only basis of a suit is an order made by the commission—then the act would be as complete without the last half of section 12 as with it, and congress stands convicted of inserting in the act language that is entirely redundant and useless. If the appellant is right, the courts must disregard a part of the law, and ignore the canon of construction that requires all parts of a statute to be given meaning and effect.

Sutherland Stat. Const., Sec. 240.
Wilkinson v. Leland, 2 Pet., 627, 632.

We confess our inability to comprehend the argument that suits of this character will deny carriers the "equal protection of the laws." And admitting that this suit is novel and unique, in the sense that it is the first of its particular kind, we might retort that inasmuch as the commission is a body with power only to gather information and report it to congress, some new process of enforcing equal treatment of communities by common carriers is necessary, if not indispensable. As the appellant, at the same time, and under similar circumstances, asserts the right to charge twice as much for transporting commodities and live stock an equal or less distance over one of its lines, than it charges on another of its lines, there ought to be a right in the government itself to institute a judicial inquiry as to such a glaring and shocking discrimination.

VI.

REMEDIES SUMMARIZED.

We have now a remedy by a public prosecution; a remedy by a complaint to the commission and an application to the courts for an enforcement of the findings and orders of the commission; a remedy by the independent action and findings of the commission, and then an application to the courts by the commission for a mandamus and injunction to enforce the same; a remedy by way of action for damages on the part of any person or persons claiming to be damaged by any common carrier subject to the provision of the act, by reason of such carrier violating any of its provisions; a remedy by an application of any person, persons, firm or corporation, alleging a violation by a common carrier of any of the provisions of the act, for a writ of mandamus; and in addition to each and all of these, by the terms of the act, all remedies at common law, or by statute, which existed at the time of the passage of the act.

VII.

CASES IN WHICH MANDATORY INJUNCTIONS HAVE BEEN GRANTED.

A mandatory injunction was granted in the following cases:

To pull down a wall which it had unlawfully erected, *Great North. R. R. Co. v. Clarence R. R. Co.*, 1 Coll., 507.

To stop all its trains at a certain station, *Earl v. G. N. R. R. Co.*, 10 Hare. 664.

To restore a stream of water to its natural channel, *Corning v. Troy Rail. Co.*, 40 N. Y., 391.

To erect a right-of-way on plaintiff's premises, *Storer v. Great W. R. R. Co.*, 2 Y. & C., 48.

To make a carriage-road and maintain a wharf, *Wilson v. Furnace Co.*, L. R., 9 Eq., 28.

To make necessary slips and rights-of-way for cattle, *Sanderson v. Cockermouth Co.*, 11 Beav., 497.

To permit the plaintiff to run its cars in such a manner as will be necessary for the safety and speedy conveyance of passengers and goods along the defendant's railway, and to furnish plaintiffs all such other conveniences as plaintiff had been accustomed to use, *Great Nor. Co. v. Manchester Co.*, 5 DeG. & S., 138.

To construct and maintain a permanent siding, *Green v. West C. Co.*, L. R., 13 Eq., 44.

To construct and maintain at a specific point a first-class railway station, and to supply it with the necessary rooms and conveniences, to be determined by the court at chambers, and to stop every passenger train thereat, to set down and take up, and, therefore, to transport passengers, *Hood v. N. E. Co.*, L. R., 8 Eq., 666; on appeal, 5 Chan. App., 525; *Commonwealth v. Eastern*, 103 Mass., 259.

To carry coals for plaintiffs on equal terms with others, *Harris v. Cockermouth Co.*, 3 C. B. N. S., 693.

To permit the omnibus of plaintiff, an express carrier, to enter the yard of a railway station for the purpose of receiving, forwarding and delivering from and upon their said railway in the same manner and to the same extent as the railway vehicles, *Mariot v. London Co.*, 1 C. B., N. S., 489.

To deliver grain in bulk without charging the plaintiff five dollars per car for so doing, *Vincent v. C. & A. R. R. Co.*, 49 Ill., 37.

See also *District Attorney v. Lynn & Boston R. Co.*, 16 Gray, 242; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Attorney General v. Tudor Ice Co.*, 104 Mass., 244; *Attorney General v. Cohoes Co.*, 6 Paige, 133; *Attorney General v. Hudson River R. R. Co.*, 1 Stock, 526; *Georgetown v. Alexan-*

dria Canal Co., 12 Peters, 98; *Attorney General v. Toronto Street Rly. Co.*, 14 Grant (U. C.), Ch., 673; *Commonwealth v. Pittsburg & Connellsville R. Co.*, 24 Penn. St., 159; *Attorney General v. Great Northern Rly. Co.*, 1 D. R., & S. M., 154, 161, 162; *Attorney General v. Leichester*, 7 Beav., 176.

VIII.

EQUITY EQUAL TO EVERY EMERGENCY.

These authorities show that equity has the power and that it is its duty, as was said by Lord Cottingham, to—

"Adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which from the progress daily taking place in the affairs of man must continually arise, and not from too strict an adherence to the forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy."

2 *Red. on Rail.*, Sec. 205.
Taylor v. Simon, 4 Myl. & C., 14.
Mare v. Malachy, 1 id., 559.
Wolworth v. Holt, 4 id., 619-635.

They also show that it is not a matter of moment that no exact precedent can be found for a case precisely like this, because the business is of recent origin, of rapid growth, of great importance, and concededly one in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science; and the case simply extends the law so as to meet a new development of commercial progress. There is no attempt to compel the railway to grant the public an interest in its property, but simply to observe its obligations to the public.

Munn v. Illinois, supra.

As was remarked by Mr. Justice Brewer, in *Chicago, Rock Island & Pacific Rly. Co. v. Union Pacific Rly Co.*, 47 Fed. Rep., 24:

"The powers of a court of equity do not end with the day. If the changed conditions of affairs twenty years hence shall make the full use of its tracks and facilities necessary to the Pacific for the transaction of its business and the discharge of its duty to the government, the powers of a court of equity are equal to the emergency. * * * I have come to the conclusion that sufficient to the day is the evil thereof, and strong enough and adequate for to-morrow are the powers of a court of equity. It is at least clear that the government, * * * whenever its rights are disturbed, may interfere and compel as against everybody the full discharge of its duties by the Pacific."

And as said by Mr. Justice Blatchford, in *Joy v. St. Louis*, 138 U. S., 1:

"Railroads are common carriers, and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation." (p. 50.)

And Mr. Justice Brewer further remarked, in his opinion in the case in 47 Fed. Rep., *supra*.

"But I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasing complex business relations, and the protection of rights, can demand. * * * The powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and to compel it to perform its contracts of every nature and do justice to every individual." (p. 20.)

Mr. Justice Bradley, in his article "Law," published in the American supplement to the Encyclopedia Brittanica, referring to this subject, says that this

"Flexible and expansive quality of a nation's jurisprudence is not only an interesting, but a highly important and essential feature of the law. * * * Throughout the national life this inexorable law will be found to prevail, that as the mutual relations of men in society multiply and controversies increase, the laws will expand to embrace them. * * * This principle of adaptation and expansion does not depend upon, and does not generally wait for, specific legislation, although often aided and supported by it. It arises from the fact that law is not merely a verbal rule, but is a concrete expression of justice as applied to the transactions of society. * * * To stop this expansion of the law would be equivalant to stopping the growth and advancement of society and the very pulse of humanity."

Certainly there is as great a public interest involved in this suit as in the cases of *Joy v. St. Louis* and *Railroad v. Railroad* from which the above quotations are taken.

The learned chief justice, in *Atty. Gen. v. R. R. Co's.*, 35 Wis., 425, *supra*, quotes further from Brice, as follows:

"The above being the grounds of the jurisdiction of the court of chancery in this behalf, the next point is, when can the attorney general direct proceedings on behalf of the government? *He may do so whenever public interests have been damnified, or will manifestly be damnified in the result by transactions which are now taking place.*"

This case was decided in 1874, prior to the memorable decision in the case of *Munn v. Illinois*, 94 U. S., 113. This latter case was decided in March, 1877, and squarely determines that—

"When private property is devoted to a public use, it is subject to public regulation."

The power over corporations by way of injunction, as heretofore shown, rests on the doctrine that corporations, *in the performance of duties owing by them to the public, are*

public functionaries. The same reasoning applies to any private property or business "affected with a public interest." Whenever the government has authority to regulate, unquestionably it has authority to enforce its regulations. And where it has authority to enforce its regulations, it has the right to choose the remedies it sees fit to employ. All common carriers engaged in interstate commerce are subject to the control and regulation of congress. The right to control or restain such agencies from violating their public duties, by way of a suit for an injunction on behalf of the government, existed long prior to the passage of "An act to regulate commerce." It was a remedy granted by courts of equity in the exercise of their equitable jurisdiction. It was not the creature of any statute, but is inherent.

Quoting again from the opinion in *Attorney General v. Railroad Companies*:

"We have been unable to find any English statute enlarging the jurisdiction of the court of chancery in such cases; and we find all the English cases proceeding without reference to statutory jurisdiction. We find no room for doubt that this jurisdiction of English courts of equity is independent of all authority by statute, and has long been as well recognized as any ground of equitable jurisdiction whatever." (35 Wis., 526.)

And by the terms of the act, as such a remedy was known and exercised prior to its passage, it still exists, and may be applied as against common carriers engaged in interstate commerce, to prevent a violation of their public duties, and to prevent irreparable injuries to the public.

Can there be any doubt that congress had in mind this very remedy when it provided in section 12:

"Upon the request of the commission, it shall be the duty of any district attorney of the United States, to whom the commission may apply, to institute in the proper court, and to prosecute under the direction of the attorney general of the

United States, all necessary proceedings *for the enforcement of the provisions of this act*, and for the punishment of all violations thereof?"

Opposing counsel have said that this suit is anomalous and exceptional, etc. The remark would not have been indulged in if counsel had given the subject more mature consideration. It is true that it may be the first suit on behalf of the government, in which an application for an injunction is made under "An act to regulate commerce." But the practice of preventing, by injunction, a violation of public duties on the part of agencies "affected with a public interest," or which owe duties and obligations to the public is by no means either anomalous or exceptional. The remedy here applied for existed before the act, as a power inherent in courts of equity, and it is preserved by the plain language of the act.

IX.

THAT THERE MAY BE A REMEDY AT LAW TO PERSONS FOR DAMAGES IS NO DEFENSE TO THIS SUIT.

It is asserted that the government cannot maintain this suit because individuals who are damaged by the discriminations complained of may sue for damages, and because the amendatory act of March 2, 1889, gives to certain persons the right to apply for writs of mandamus in the cases therein mentioned. It will be observed that in said amendment congress was careful to again reiterate its purpose of preserving all existing remedies that could be invoked by citizen or government for the enforcement of the great principle of equality which tried to find expression in this statute. The language is:

"That the remedy hereby given by writ of mandamus shall be cumulative, *and shall not be held to exclude or interfere with other remedies provided by this act, or by the act to which it is a supplement.*"

The remedy provided by said amendatory act is at the suit of a private person to redress a private injury. The present suit is on behalf of the public, to prevent a public injury, which is irreparable by reason of its continuing character, and that the damages occasioned are estimable only by conjecture, and not by an accurate standard.

Further than that, it is insisted, that when the government interferes for the protection of public interests, it has a right to the choice of whatever remedies there may be.

Quoting again from the case of *Attorney General v. Railroad Companies, supra*:

"It was hardly denied that the English court of chancery entertains jurisdiction in such cases; and indeed the English books leave little room for such a denial.

"But it was said that, in England, the attorney general has a right to elect his forum, legal or equitable. And it is so said in some of the cases. (*Attorney General v. Mayor of Galway,* 1 Molloy, 103.) But it appears to us that this logically follows, everywhere, upon equitable jurisdiction to restrain corporate violations of charters or other public laws. In such cases there is always a remedy at law. The attorney general may proceed at law by *quo warranto* to forfeit the charter of the offending corporation, and, if there be a penalty, as often happens, he may sue for it at law. And the concurrent remedy by injunction inevitably gives the election imputed to the attorney general. And we see no reason why the attorney general here has not the same election. To deny him such an election is only another way of denying the jurisdiction.

"The equitable jurisdiction precludes the objection that there is an adequate remedy at law. It admits the remedy at law, but administers its own remedy in preference when the state seeks it in preference." (35 Wis., 523, 524.)

"A state, as a political corporation, has a right, independent of any statutory provision, to institute a suit in any of her courts, whether it be required by her pecuniary interest or the general public welfare." (*People of the State of Illinois v. St. Louis,* 5 Gilman, 351.)

"An act of congress is not necessary to enable the United States to sue. It can sue in its own name like an individual, unless a different method is prescribed by law."

United States v. Baker, 1 Paine, 156.

A common carrier engaged in interstate commerce is performing a public office, or engaged in a business "affected with a public interest," and is subject to the laws and regulations of the United States.

X.

THE BILL DOES NOT PLEAD CONCLUSIONS OF LAW.

This objection to the bill was not urged in the circuit court. It is not found in the assignment of errors. The fifth paragraph of said assignment charges that the circuit court erred in restraining appellant from continuing to charge unreasonable rates, etc., because the court assumed, without proof, or sufficient allegation, that the defendant had charged unjust rates.

In the ninth paragraph the same objection is made in respect of the decree assuming that the service between St. Louis and Omaha and St. Louis and Wichita were carried on under substantially similar circumstances and conditions. These objections were not presented to the circuit court of appeals, but it was urged in the brief filed in that court, that the bill fails to comply with the rules of good pleading in the above respect. We are not called upon to reply to this part of the argument, nor will the court pass upon it. It was not presented to or passed on by the circuit court, and the rule, and the repeated decisions of this court, require *all* errors relied on to be specified in the assignment of errors.

But counsel are mistaken, not in their premise, but in their conclusion. It is doubtless true that the statement of a conclusion of law is bad pleading. But it is purely a question of fact whether the conditions and circumstances under which traffic is conducted are similar or dissimilar. In the amended bill the tariffs fixed by the defendant are set out. They show that the people in the locality of Wichita are charged double

what the people in the vicinity of Omaha are charged for the same service, although the distance between Wichita and St. Louis is 43 miles less than the distance between Omaha and St. Louis. It is also shown that the traffic passes over the same rails for about one half the distance. This is followed by averments that the traffic was conducted "contemporaneously, and under similar circumstances and conditions." If, as must be conceded, these are matters of fact, it was no more necessary to state the hours at which freight trains departed from Wichita or Omaha, than to state, in detail, either the circumstances or conditions under which the freight was transported. If the bill, in this respect, is deficient, it must be because it does not set forth the cost of the service, the relative grades of the two lines westwardly of Holden, the character and volume of business between the respective cities and intermediate points, the different lines of railroad that compete for that business, the creation and maintenance by the railroad companies of so-called basing lines, the potential influence of the Missouri river as a means of transportation between St. Louis and Omaha, and other like considerations. But all of these are matters of fact and not of law, and it is no more necessary to plead them than it would be the reasons why a tract of land was worth a specific sum of money, or that a lump sum of money claimed as damages was made up of different items of loss, or any other matter of evidential character.

No authority was cited by opposing counsel in support of this branch of their argument, but it is believed that the bill meets the tests laid down by the books. Daniell's Chan. Pl. & Pr. (Vol. 1, 6th Am. Ed. p. 369) says that it is only necessary "to give the defendant full information of the case which he is called upon to meet," and Story (Eq. P. Par. 253) states that general certainty is sufficient in pleadings in equity. In 3 Ency. Pl. & Pr. 355, it is said:

"A general charge or statement of a matter of fact is sufficient, and it is not necessary to charge minutely all the circumstances that may conduce to prove the general charge. These circumstances are properly matters of evidence, which need not be charged to let them in as proof, especially when they are of such a nature as to be peculiarly within the knowledge of the defendant."

The bare averment that the defendant unlawfully discriminated against Wichita would be stating a conclusion of law—the opinion of the pleader upon the facts. But a statement that the defendant discriminated because it charged twice as much to A as it did to B for like service at the same time, and under the same circumstances and conditions, is a statement of substantive facts, and not of law or conclusions of law. It is a statement that an overcharge in a certain amount was made at a stated time for the transportation of a given article, and that the situation as to external circumstances, and the surroundings—the particulars which attended or affected the act—were substantially similar. In *Commission v. Railway*, 168 U. S. 144, after pointing out that the third section of the act forbids the making or giving any undue or unreasonable preference or advantage to any particular locality, without defining the language, and that the fourth section does not define what substantially different circumstances and conditions are, the court remarks that *these are all questions of fact depending on the matters proved in each case.*

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S., 194.

Interstate Commerce Commission v. Alabama Mid. R. Co., 168 U. S., 144.

Louisville & N. R. Co. v. Behlmer, 175 U. S., 648.

XI.

THE FACTS THAT, STRICTLY SPEAKING, THERE IS NO NATIONAL COMMON LAW, AND THAT CARRIERS HAVE THE RIGHT, AT THEIR OWN RISK, TO MAKE RATES WHICH, WHEN MADE, ARE PRESUMPTIVELY LAWFUL, DO NOT AFFECT THE QUESTION.

The propositions above stated were presented by opposing counsel to the courts below at considerable length. But, assuming that the vexed question of what the common law did forbid in the way of discrimination has been correctly answered, and that thereunder a carrier was prohibited only from giving undue advantage to one person or class of persons, it is not perceived that this militates against our position. If, as is admitted by the demurrer, the appellant did violate the statute, it cannot be a matter of moment that, at the common law, no relief could be had for the acts complained of. Nor does the concession qualify or restrict the right of the government to enforce the statute, in the interest of that portion of the public which suffers from the unlawful practices set up and confessed.

The other consideration is equally futile. Doubtless, the appellant had the right to announce the rates it proposed to charge for transportation between the different points on its lines, and to enforce those rates until some tribunal or authority, with power to test and determine their legality, was called on to exercise its authority. The appellant urges that the commission is exclusively clothed with this authority, that the jurisdiction of the courts is purely derivative, and that congress, by clothing the commission with certain duties, impliedly took from the other executive officers of the government the right they otherwise had of compelling public ser-

vants to obey public laws, and perform public duties. The statement of the proposition is its best answer.

In *Interstate Commerce Commission v. Railway,* 168 U. S., 144, the court had this question under consideration. In that case, while it is conceded that the carrier has the right when dissimilar circumstances and conditions are found to exist, to fix its rates so as to meet those conditions, the court distinctly affirms that rates made under such circumstances "are subject to revision by the commission *or the courts,* when it is charged that such rates are unjust or unreasonable, or that they unjustly discriminate." (p. 173.)

The decree of the circuit court should be affirmed.

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